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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

CPC INTERNATIONAL, INC., ET AL.,

On Writ Of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICUS CURIAE SUGGESTING AFFIRMANCE

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AMERICAN PETROLEUM INSTITUTE,
GROCERY MANUFACTURERS OF AMERICA,
INSTITUTE OF SCRAP RECYCLING INDUSTRIES,
NATIONAL SOLID WASTES MANAGEMENT ASS'N,
UGI UTILITIES, INC., and
WASTE MANAGEMENT, INC.

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INTEREST OF AMICUS CURIAE

The *amici* are a group of business associations and corporations which, either directly or through their members, are consistently involved with issues arising under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and with issues concerning the proper and legal structuring of corporations and other business forms. The *amici* have broad experience in the capital markets of the United States and deep understanding of the importance of the principles of limited liability at issue in this case.[1/]

SUMMARY OF THE ARGUMENT

The doctrine of limited liability was originally formulated in the 19th century by the state legislatures to implement *both* economic and democratic goals. It remains a fundamental part of the statutory law in all fifty states. In its original conception, limited liability was perceived as a means of encouraging the small-scale entrepreneur, and of keeping entry into business markets competitive and democratic. Limited liability reduces the potential costs and risks of buying shares, and thus encourages investment and capital formation. Limited liability also facilitates the development of public markets for securities, permits the allocation of risks or benefits between parties, and supports the certainty of planning necessary to those who have organized corporations. It is a fundamental background norm of the American legal system, and is a principle well-known to and understood by virtually all members of Congress.

In this case, the government ("Petitioner") argues that it is

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[1/] Pursuant to S. Ct. R. 37.6, no counsel for a party authored this brief. Other than the *amici*, only Browning-Ferris Industries, Inc. made any monetary contribution. Consents to file this brief have been received from all parties and filed with the Court.

appropriate and necessary to extend the reach of CERCLA liability in a manner contrary to these long-established principles. In acceding to this desire, some lower courts, however well-intentioned, have twisted the language of the statute and undermined two fundamental constitutional principles. First, Congress, not the courts, writes the law. And, in deference to our federal system, Congress must never be presumed silently to have displaced state law.

The language of the statute is straight-forward. Section 107(a)(2) of CERCLA makes liable persons who "owned or operated" hazardous waste sites. Section 101(20)(A)(ii) defines "owner or operator" as the "person owning or operating" such a location. There is no question in this case that CERCLA makes liable the subsidiary which actually conducted the operations at the site. The issue here is whether the definition of "operator" should be given an expanded interpretation to cover additional parties who were neither the titular owner or operator but who, according to Petitioner, should nonetheless be swept into the CERCLA "operator" liability net on the ground of having had "control" over the subsidiary's conduct.

There is no statutory language suggesting that the term "owning or operating" includes such broader concepts as mere "control" of a subsidiary. Indeed, other sections of the statute compel the conclusion that the "control" concept was purposely excluded from the pertinent definition of "owner or operator" by Congress. Congress acted against a long-standing backdrop of state laws limiting liability for shareholders. There is a presumption, having *constitutional* dimensions, that Congress incorporates these background norms into its enactments unless it explicitly states otherwise. But there is nothing in CERCLA or its legislative history to suggest that Congress intended these long-established state law principles to be displaced.

Recent decisions of this Court affirm that state law may only be supplanted by judicially-created federal common law in "extraordinary cases." *E.g., O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 89 (1994); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). There is nothing extraordinary about CERCLA that justifies the *ad hoc* displacement of traditional state law, nor are questions about when a shareholder should be held subject to its subsidiary's liabilities by any means unique.

Finally, the repeated creation of "federal common law" under CERCLA, displacing traditional state law standards, has affected the ability to allocate risks and benefits through use of limited liability forms, the conduct of asset transactions, the ability to dissolve corporations under state law, and even probate of decedents' estates. Absent a conflict with a significant federal interest such tampering is unwarranted.

ARGUMENT

I. CERCLA'S DEFINITION OF "OWNER OR OPERATOR" IS TO BE APPLIED IN LIGHT OF TRADITIONAL CORPORATION LAW

A. The Language Of The Statute And Its Legislative History Contain No Hint That Traditional Corporation Law Principles Should Not Apply

CERCLA § 107(a)(2) makes liable:

> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of....

"Owner or operator" is defined in CERCLA § 101(20)(A):

> The term "owner or operator" means ... (ii) in the case of an onshore facility [like the one in this case] ... any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, *or otherwise controlled* activities at such facility immediately beforehand.

Thus, an "owner" is "any person owning" and an "operator" is "any person ... operating" the hazardous substance facility. The very circularity of the definitional language is most important guidance in answering the question before this Court — whether a parent is the "operator" of a facility which is actually both owned and operated by a subsidiary corporation.[2/]

Petitioner argues that Congress (albeit silently) intended to impose liability on a parent which "actively participates in and exercises control over" the subsidiary's facility and urges this Court to adopt that test. *E.g.*, Pet. Br. 17.[3/] No such intent is

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[2/] As the Seventh Circuit observed regarding this definition, *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 156 (7th Cir. 1988) (emphasis added):

> [t]his [definition] is circular.... The definition ... [therefore] must come from a source other than the text. The circularity strongly implies, however, that the statutory terms have their ordinary meanings *rather than unusual or technical meanings.*

[3/] To do so, Petitioner makes much of Congress' use of the word "or" to connect "owner or operator," arguing that this one word shows Congress acted "without regard" to a party's "formal corporate relationship to the site." Pet. Br. 21-22 (citing *U.S. v. Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991)). There is a simpler explanation for using the word "or": while often the same person both owns and operates the site, sometimes, as in the case of a landlord (the owner) and a tenant (the operator), ownership and operation are split. Section 107(a)(2) makes both liable — but the mere fact that the owner and the operator can be separate people does not support the much more dramatic proposition that Congress intended to supplant principles of limited liability.

revealed by the text of the statute or its legislative history. And only buried at the end of its brief is Petitioner's true test revealed: a parent corporation will be liable when it "steps beyond its role as a stockholder ... and actually participates in the day-to-day operation of a subsidiary." *Id.* at 41. *Factually*, Petitioner says its test will be satisfied by evidence showing that the parent has caused its own officers also to become active officers of the subsidiary, *id.* at 44, which is quite the usual course in American business.

Petitioner does not offer a single citation to the 1980 legislative record regarding this definition to support its claim about what Congress "intended." This is not surprising in light of the fact that CERCLA's legislative history does not offer the slightest suggestion that parent corporations should be liable for actions of a subsidiary when traditional veil-piercing law would not impose liability.[4/] Congress acted against a backdrop

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[4/] The CERCLA definition of "owner or operator" and the "security interest" exemption attached to it are traceable in the legislative history to separate provisions in the original Senate and House bills. The original Senate bill, S. 1480, provided that the term "owner or operator" "shall have the meaning provided in section 311(a) of the Clean Water Act." S. 1480, 96th Cong. § 2(1). Section 311(a)(6) of the Clean Water Act, 33 U.S.C. § 1321(a)(6), provided then (and now) that "owner or operator" means "(B) in the case of an onshore facility ... any person owning or operating such onshore facility...." This is the exact language now found in CERCLA § 101(20)(A)(ii). This same language was reported to the floor of the Senate, without any discussion of an intent to supplant limited liability, in the committee report. S. Rep. No. 96-848, 96th Cong., 2d Sess. (1980).

of traditional principles of corporations law and expressed no intent to depart from those principles.[5/]

B. When Congress Acts Against An Established Legal Background, Statutory Terms Incorporate That Background Unless Congress Otherwise Specifies

That Congress intended the words "owner" and "operator" to be given their usual meanings and understood in light of their long-established corporations law backdrop is evident in the very circularity of the definition. *See Edward Hines Lumber, supra*, 861 F.2d at 156. Congress did not expand

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The original House bill on this subject, H.R. 85, expressly exempted from its entirely different definition of "owner," — *not "operator"* — any person "who, without participating in the management or operation of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." H.R. 85, 96th Cong. § 101(x). This provision, aimed at protecting lenders in title theory states from "owner" liability *and wholly separated from the concept of "operator" liability*, is the source of the "security interest" exemption in CERCLA § 101(20)(A).

After these bills passed their respective chambers, various sections of the bills were merged without any Conference Report in a lame duck session after the 1980 elections (which changed control of the Senate). The final compromise version of CERCLA § 101(20)(A) used the Senate's incorporation of the Clean Water Act definition of "owner or operator," and appended to that Water Act definition the House's "security interest" exemption from "owner" liability.

[5/] Since CERCLA's definition of "owner or operator" was borrowed from the Clean Water Act, *supra* n.4, this Court may consider cases interpreting that statute. *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 301 (1959). In the only case addressing parent-subsidiary liability under that Act, *United States v. Ira S. Bushey & Sons, Inc.*, 363 F. Supp. 110 (D. Vt.), *aff'd mem.*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974), the court applied a traditional veil piercing test.

upon the definition in order to provide other law to apply nor did it suggest in the legislative history that the words were to be applied in derogation of established corporations law concepts.

The simple meaning rule is especially applicable when, as here, Congress has not otherwise defined the statutory terms and those terms have a well-understood legal meaning. The "normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. New Jersey*, 474 U.S. 494, 501 (1986).[6/] Rejecting a suggestion that a new statute had changed judicially developed concepts of tort liability, for example, this Court held that:

> [t]he legislative history strongly counsels against [such an] interpretation of the statute, which modifies ... pre-existing rights.... The reports and debates ... contain not a word of this concept. This silence is most eloquent, for such reticence while contemplating [what would be] an important and controversial change in existing law is unlikely. Moreover, the general statements appearing in the legislative history ... are inconsistent with what respondent argues was in the back of the legislators' minds about this specific issue.

[6/] *Cf. Morissette v. United States*, 342 U.S. 246, 263 (1952) (Jackson, J.):

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word ... and the meaning its use will convey to the judicial mind unless otherwise instructed ... [A]bsence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Edmonds v. Campagnie Generale Transatlantique, 443 U.S. 256, 266 (1979).

1. Congress Knows How To Overcome The Corporate Form When It Intends To, And Did So In A Different Clause Of This Very Statute

The *en banc* Sixth Circuit in this case explicitly noted the difference between the definition in § 101(20)(A)(ii), which applies in this case — an "owner or operator" is "any person owning or operating" — and the definition in the very next clause of CERCLA, § 101(20)(A)(iii), which governs facilities conveyed to state or local governments. In the latter case an "owner or operator" is "any person who owned, operated, *or otherwise controlled*" the facility prior to such conveyance. As the Sixth Circuit stated, "the drafters of the statute distinguished an operator from a person who 'otherwise controlled' a facility." *U.S. v. Cordova Chemical*, 113 F.3d at 579. *Accord Joslyn Mfg. Co. v. T.L. James & Company, Inc.*, 893 F.2d 80, 83 (5th Cir. 1990) ("No such 'control' test appears in subsection (ii), the subsection at issue in this case, and we will imply none."), *cert. denied*, 498 U.S. 1108 (1991).[7]

As the district court in the *Joslyn v. T.L. James* case found, the presumption that Congress intends its statutes to be read in light of the traditional rules of limited liability is bolstered by "the fact that Congress has, in the past, specified [when] shareholders or controlling parties are to be held responsible for the acts or debts of a valid corporation." 696 F. Supp. 222, 226 (W.D. La. 1988), *aff'd, supra*. That court identified four statutes where Congress had explicitly determined to override

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[7] *Cf. O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 86 (1994) (quoting maxim *"Inclusio unius, exclusio alterius"*).

the corporate form or modify limited liability.[8] *Id.* There are many others.[9] To ignore the corporate form without explicit support in the text of the statute diminishes Congress' power to decide when limited liability principles should be overridden — a power exercised here only sparingly in the narrow case of CERCLA § 101(20)(A)(iii) facilities.[10]

Petitioner's second statutory interpretation argument — that the "security interest" exemption from the definition of *"owner"* in § 101(20)(A) aids in construing the term *"operator"* in § 101(20)(A)(ii) because it suggests that Congress intended to

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[8] *E.g.*, Depository Institution Management Interlocks Act, 12 U.S.C. §§ 3201-3207; Internal Revenue Code, 26 U.S.C. § 1239(a)(2), (3); Fair Labor Standards Act, 29 U.S.C. § 203(r); and Employee Retirement Income Security Act, 29 U.S.C. § 1301(b)(l).

[9] *E.g.*, National Bank Act § 12, 12 U.S.C. § 63, *repealed* P.L. 86-230 (double liability of bank shareholders); Securities Exchange Act of 1934, 15 U.S.C. § 78t (liability of "controlling persons"); Federal Aviation Act, 49 U.S.C. App. § 1301(31) (defining "operation of aircraft" to include any "person who causes or authorizes with or without the right of legal control...."; *see United States v. Midwestern Pouch Express, Inc.*, 662 F. Supp. 207, 211-12 (D.N.J. 1987) (specifically distinguishing limited liability principle on basis of this statutory language)).

[10] The conclusion that it was Congress' intent in CERCLA to impose liability on persons who "otherwise controlled" a facility *only* in the narrow instance of § 101(20)(A)(iii) is bolstered by comparison with the Clean Water Act, the source of the CERCLA definition. In the Water Act the third clause of the "owner or operator" definition imposes liability "in the case of an abandoned ... facility, [upon] the person who owned or operated such facility immediately prior to such abandonment." 33 U.S.C. § 1321(a)(6)(C). The Water Act does *not* impose liability upon those who "otherwise controlled" activities at those abandoned facilities, as does the CERCLA definition. The only possible conclusion is that Congress purposely adopted the broader "control" standard *only* for the case of CERCLA clause (iii) facilities conveyed to state or local governments.

reach anyone who "participates in the management" of a facility, Pet. Br. 22-23 & 25 — fails for two reasons. First, an exemption from "owner" liability for holders of security interests who "participate" says nothing about the meaning of "operator."[11/] Second, the argument founders on the shoals of clause (iii). The "security interest" exemption on which Petitioner relies applies to *all three* clauses of § 101(20)(A). If the word "operator" in these three clauses *already* includes those who "participate" or otherwise have "control" by virtue of gloss derived from the "security interest" exemption, then why did Congress need to use the words "or otherwise controlled activities" in order to broaden clause (iii)? Using the "security interest" exemption to construe the word "operator" to include a participation or control test makes the phrase "or otherwise controlled activities" in clause (iii) mere surplusage, which is a forbidden result. *United States v. Menasche,* 348 U.S. 528, 538-39 (1955) ("[i]t is our duty 'to give effect, if possible, to every clause and word of a statute'").

2. *The Statute's Remedial Purpose Is Not A License To Ignore Historic Principles Of Corporation Law*

The Sixth Circuit properly refused "to erect new concepts of corporate liability within the framework of CERCLA in the absence of direction from Congress." 113 F.3d at 579. But Petitioner and its *amici* contend that the "remedial" nature of CERCLA and its "objectives" dictate that limitations on liability be ignored, Pet. Br. at 26, *accord* Amici States Br. at 15-16, as if unstated congressional language could be divined simply because this is an environmental statute. "Remedial"

[11/] Even the case primarily relied upon by Petitioner, *U.S. v. Kayser-Roth, supra,* notes that the "security interest" exemption is only an "explicit limitation" on "owner liability." 910 F.2d at 26 n.6.

purpose alone cannot change the facts that Congress chose not to do what Petitioner desires this Court to do, and that courts construing remedial statutes cannot simply rewrite them to ignore long-standing principles of limited liability.[12/]

The powerful remedial purposes of the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §§ 1981-1983, for example, have not empowered the courts to disregard traditional principles of limited liability, nor have courts felt compelled to do so when implementing such remedial statutes as the Employee Retirement Income Security Act, 29 U.S.C. § 1381, *et seq.*[13/]

In *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), this Court refused to ignore the long-standing background principle of legislative immunity in interpreting § 1983. Noting congressional silence on the question, the Court held that it could not "believe that Congress ... would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us." Fifteen years later, the Court ruled similarly regarding judicial immunity:

[12/] *Cf. Edward Hines Lumber,* 861 F.2d at 157 ("To the point that courts could achieve 'more' of the legislative objectives by adding to the lists of those responsible, it is enough to respond that statutes have not only ends but also limits. Born of compromise, laws such as CERCLA ... do not pursue their ends to their logical limits. A court's job is to find and enforce stopping points no less than to implement other legislative choices.").

[13/] Similar arguments have been rejected in cases arising under other remedial statutes. *E.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976) (Securities Act: "remedial purpose" not sufficient to "add a gloss to the operative language of the statute quite different from its commonly accepted meaning"); *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686 (5th Cir. 1985) (applying usual veil piercing tests in False Claims Act case against parent of subsidiary convicted of stealing $2.53 million from the United States), *cert. denied,* 475 U.S. 1014 (1986).

> We do not believe that this settled principle of law was abolished by § 1983, which makes liable "every person".... The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities... [W]e presume that Congress would have specifically so provided had it wished to abolish the doctrine.

Pierson v. Ray, 386 U.S. 547, 554-55 (1967). *Accord Owen v. City of Independence*, 445 U.S. 622, 637-39 (1980) (applying common law rules of corporation liability to municipal corporation liability under § 1983).

These principles have also long been applied to business entity liability questions arising under the Civil Rights Acts. In *Tillman v. Wheaton-Haven Recreation Ass'n*, 517 F.2d 1141 (4th Cir. 1975), the court held that traditional corporation law rules should apply to the liability *vel non* of corporate directors who violate §§ 1981 and 1982. Discussing *Tenney* and *Pierson, supra*, the court held:

> [i]n short, the Court interpreted § 1983 as neither enlarging nor diminishing traditional immunities of public officials. Comparably, §§ 1981 and 1982 should be interpreted as neither enlarging nor diminishing the liability of directors under general corporation law for tortious acts performed nominally by the corporation.

Tillman, 517 F.2d at 1143-44.[14]

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[14] Similarly, in *Spears v. Transcontinental Bus System, Inc.*, 226 F.2d 94, 97 (9th Cir. 1955), *cert. denied*, 350 U.S. 950 (1956), the court applied traditional veil piercing theories and refused to find a parent corporation liable for the civil rights violations of its subsidiary. *See also Berger v. Iron*

Cases under ERISA, too — another remedial statute designed to protect a government fund from costly corporate defaults — have rejected attempts to impose liability upon shareholders without regard to the corporate form. *E.g., DeBrecini v. Graf Bros. Leasing, Inc.*, 828 F.2d 877 (1st Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988). There, the fund trustee argued that the undefined term "employer" should be construed in light of "economic reality" to reach the shareholder because the latter maintained "virtually complete control of the day to day operations" of the corporation. *Id.* at 879. The court "beg[a]n with the observation that the principle of limited liability is a cornerstone of corporate law." *Id.*

> We have [here] a statute that, on its face, does nothing to alter the principle of limited liability, but that appellant urges us should nevertheless be read to do so... [T]he principle of limited liability for corporate debts is longstanding enough and important enough to be considered a background norm, against which Congress may act of course, but which is controlling in the absence of such action... The way that one could have expected Congress to make such an intention felt was through a definition of the word "employer." Yet Congress did not define the word....

Workers Reinforced Rodmen Local 201, 843 F.2d 1395, 1428 (D.C. Cir. 1988) (rejecting argument that "special standards" should apply under § 1981: "where Congress has not otherwise declared the standards ..., a union's liability for the acts of another is to be determined under common-law agency principles.... [W]e think that if Congress intended that international unions be held liable for the failings of their locals with regard to civil rights under a special standard, it would have given some indication to that effect), *on reh.*, 852 F.2d 619, 621 ("distinct juridical personality of an entity is not a legal nicety").

Id. at 880.[15]

3. Petitioner's Argument Goes Beyond the Bounds of Statutory Interpretation

In essence, Petitioner very artfully argues that its proposed test of parent corporation operator liability is merely a matter of statutory construction of the alleged "ordinary meaning" of the definition of "owner or operator." *E.g.*, Pet. Br. 17. "But," as this Court has observed, "the authority to construe a statute is fundamentally different from the authority to fashion a new rule ... which Congress has decided not to adopt." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97 (1981). *See also Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 642-47 (1981). Petitioner's proposed test crosses well over the line where statutory construction becomes the fashioning of a new federal common law rule.

The principle of limited liability is a background norm, against which Congress may, of course, act, but which is controlling in the absence of such action. *E.g., Burks v. Lasker*, 441 U.S. 471, 478 (1979) ("Congress has [not] indicated that the entire corpus of state corporation law is to be replaced...."). Moreover, there is *nothing* in CERCLA or its legislative history to suggest that Congress contemplated that its definition of "owner or operator" would result in the dilution of the principle of limited shareholder liability. In such a situation — the

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[15] *Accord Connors v. P & M Coal Co.*, 801 F.2d 1373, 1376-77 (D.C. Cir. 1986) ("nothing in either the language or purpose of MPPAA to justify so significant a compromise of the ... principle of limited liability, nothing to suggest that Congress intended to subject owner-operators of a closely held corporation to personal liability merely because they actively participated in running the business. Acceptance of the district court's 'interest and control' test would ... subvert the major purpose of incorporation....").

existence of a strong background norm *combined with* the absence of any information suggesting legislative intent to overcome it — an approach such as Petitioner's, with a result as dramatic as Petitioner's, cannot be deemed mere statutory construction. Instead, Petitioner's argument constitutes the improper making of federal common law.

II. JUDICIAL CREATION OF A SPECIAL FEDERAL COMMON LAW RULE IS PERMISSIBLE ONLY IN "FEW AND RESTRICTED" CIRCUMSTANCES

A. State Law Should Not Be Displaced By Special Federal Rules Except in Rare Circumstances

Several times in recent years this Court has addressed the limited circumstances in which uniform federal common law rules of decision may be created in lieu of the adoption of state law to answer questions of federal law. *Atherton v. F.D.I.C.*, 117 S. Ct. 666 (1997); *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79 (1994); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). *See also Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68-69 (1966). The Court has stated that only in "extraordinary cases [is] judicial creation of a federal rule of decision is warranted." *O'Melveny*, 512 U.S. at 89. The Court has, moreover, applied these federalism-based holdings directly to questions about whether to displace state corporations law, and has consistently rejected the creation of federal common law tests to resolve corporations law questions arising under federal statutes. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 98-99 (1991); *Burks v. Lasker, supra*, 441 U.S. at 478.

Kimbell Foods established a three-part test to limit when courts may create uniform federal rules of decision to supplant state law. Under *Kimbell*, the criteria to be considered are: (i)

the need for national uniformity, (ii) whether the application of state law would conflict with specific objectives of the federal program, and (iii) the disruption displacing state law would have on commercial relationships. 440 U.S. at 728-29.

The *Kimbell Foods* Court gave little credence to "generalized pleas for uniformity" in the absence of "concrete evidence that adopting state law would adversely affect" the federal program. *Id.* at 730. Likewise, the Court found that the threat to a federal policy must be acute and substantial; the fact that state law might "undermine its ability to recover funds disbursed" — a primary argument of Petitioner here — does not constitute a sufficient "conflict with program objectives." *Id.* at 733. And appropriate deference must be given to state law because "businessmen depend on state commercial law to provide the stability essential for reliable evaluation of the risks involved." *Id.* at 739. A unanimous Court concluded that "the prudent course is to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *Id.* at 740.[16/]

The recent *O'Melveny* and *Atherton* decisions reinforce this Court's holding in *Kimbell Foods*. In both cases the Court held that the "cases in which judicial creation of a special federal rule would be justified are 'few and restricted.'" *O'Melveny,* 512 U.S. at 87; *Atherton,* 117 S. Ct. at 670. Both cases

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[16/] It has been observed that *Kimbell Foods* "effectively establishes a ... negative presumption against federal common law" that is "the opposite side of the same coin as the Rules of Decision Act," originally § 34 of the Judiciary Act of 1789 and now codified at 28 U.S.C. § 1652, which, in turn, "[a]t a minimum ... creates a presumption in favor of state law." Sisk and Anderson, *The Sun Sets on Federal Common Law: Corporate Successor Liability Under CERCLA After O'Melveny & Myers,* 16 Va. Envtl. L.J. 505, 560 (1997).

underscore the need to find unequivocally that application of state law would, in a meaningful and critical way, significantly conflict with federal policy or interests. *Id.*

O'Melveny found that it is particularly inappropriate to "supplement statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." 512 U.S. at 85. As Petitioner admits, CERCLA is such a "comprehensive" scheme. Pet. Br. 18. To allow the creation of "additional 'federal common-law' ... is not to 'supplement' this scheme, but to alter it." *O'Melveny,* 512 U.S. at 87.

The need for uniformity is commonly trumpeted as an important federal interest but such generic calls for uniformity are often "lightly invoked" and without merit. *Id.* at 88; *accord Atherton,* 117 S. Ct. at 671. Here, Petitioner makes a similar argument, citing the alleged "vagaries" of the various states' laws, Pet. Br. 40. In *O'Melveny*, this Court rejected the government's argument that uniformity was needed to facilitate its litigation, commenting that if that were so, the country would be "awash in federal common-law rules." 512 U.S. at 88 (quotations omitted). And, at any rate, despite linguistic variations, the issue of disregard of the corporate form shows substantial doctrinal consistency among the States. *E.g.*, Dennis, *Liability of Officers, Directors and Stockholders Under CERCLA: The Case For Adopting State Law,* 36 Vill. L. Rev. 1367, 1424 n.233 (1991).[17/]

[17/] Ironically, one of the primary results of creating an allegedly "uniform" federal common law of parent-subsidiary liability under CERCLA is the inconsistency the tests create. *Compare U.S. v. Kayser-Roth Corp.*, 910 F.2d at 27 (1st Cir. 1990) (applying "active involvement" test "without deciding the exact standard necessary for a parent to be an operator"), *with Lansford-Coaldale Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221(3d Cir.

One of the reasons cases authorizing displacement of state law are so rare is because such displacement requires a "specific concrete federal policy or interest that is compromised" by using state law. *Id.* at 88; *accord Atherton,* 117 S. Ct. at 670 (conflict is a "precondition"). In *O'Melveny* the government argued that its interest that the bank deposit insurance fund not be depleted constituted such a conflict. The same argument is made repeatedly by Petitioner in the instant case. *E.g.*, Pet. Br. at 26; 33 n.18; and 38. But in *O'Melveny* this Court held that federal common law could not be created for that purpose "because *there is no federal policy that the fund should always win.*" 512 U.S. at 88 (emphasis added). This "more money" argument has also been made and rejected in *Kimbell Foods*, 440 U.S. at 737-38, and in other cases. *See O'Melveny*, 512 U.S. at 88 (citing cases). Indeed, the very reason *why* CERCLA's "Superfund" exists is to pay for cleanups where, even under CERCLA's broad liability scheme, no solvent liable party exists — a powerful indication that Congress expressly contemplated that there would be cases where the fund would not "win."

1993) (adopting "actual control" standard, "which appears to strike the appropriate middle ground"), *with Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir.) (adopting "authority to control" test), *cert. denied,* 506 U.S. 940 (1992), *with Schiavone v. Pearce,* 79 F.3d 248, 254 n.5 (2d Cir. 1996) (adopting federal common law but declining to specify its content, thus leaving businesses in the Second Circuit in the dark). The district court in this case itself observed that "different tests for liability have been developed" by the courts it followed. *CPC v. Aerojet-General,* 777 F. Supp. 549, 573. The confusion is such that even Petitioner identifies three standards and is forced to disclaim reliance on the *Nurad* standard. *See* Pet. Br. at 31 n.17. *See also Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 132 F.3d 1295, 1300 n.4 (9th Cir. 1997) ("courts that have attempted to fashion federal common law rules ... under CERCLA have created conflicts and uncertainties over a number of issues").

Last, but by no means least, Petitioner's rule would interfere with the state corporate law rules that have for decades shaped the legal expectations of parties to all types of complex business transactions, mergers and acquisitions, and in the very creation of corporate and partnership forms.[18] The States have long weighed and considered the value of limited liability and how best to provide transactional certainty. The state limited liability statutes and veil-piercing rules at issue are rules of general applicability which the States have found fit to apply to a wide variety of disputes among their own citizens. There is no showing of a "race to the bottom," or that the States have designed their corporate liability rules to defeat legitimate federal interests. *Anspec, supra,* 922 F.2d at 1250 (Kennedy, J., concurring). This disruption of long-established commercial practices weighs heavily against Petitioner.

B. The Area of Corporations Limited Liability Law Is Particularly Unsuited For Judicial Law-Making

This Court has repeatedly warned against second guessing the wisdom of state law, citing the danger of a "facile approach to federal-common-law-making." *O'Melveny,* 512 U.S. at 89. Federal common-law-making in this area will inevitably

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[18] *Accord Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1250 (6th Cir. 1991) (Kennedy, J. concurring):

> Private parties have relied on state corporation law when making corporate acquisitions and in forming and dissolving corporations. The prices paid by the buyers to the sellers in those transactions undoubtedly reflected, in part, the parties' understanding concerning who retained the seller's liabilities.

See generally Sisk and Anderson, *The Sun Sets on Federal Common Law, supra,* 16 Va. Envtl. L.J. at 571-75.

encounter a myriad of legislative and policy problems, forcing judges to consider and weigh all sorts of cost-benefit issues better left to the evolution of state common law or to the legislative process. And separation of powers concerns inhere in every exercise of federal common law making, as the courts become "untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy." *Id.*

It is particularly inappropriate for the federal courts to tamper with the limited liability law of the States because that law is predicated on a complex interplay of historic considerations. In *O'Melveny* this Court repeated that "the function of weighing and appraising" the multitude of considerations that make up "what sort of ... liability to impose" "is more appropriately for those who write the laws, rather than for them who interpret them." *Id.* This Court has emphasized:

> the presumption that state law should be incorporated ... is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards.... Corporation law is one such area.

Kamen, 500 U.S. at 98. *See also Burks v. Lasker*, 441 U.S. 471, 478 (1979) ("Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a ... cause of action is based upon a federal statute."). Creating a new federal common law of limited liability (or unlimited liability) will "necessarily infuse corporate decisionmaking with uncertainty" and unsettle over a century of business practice. *Kamen,* 500 U.S. at 105.

Such a "quantum of federal common lawmaking," too, implicates substantial political and policy questions that

"exceed[] [the] federal courts' interstitial mandate." *Kamen* at 104. The "doctrine of limited liability was originally formulated, in this country, in order to implement *both* economic and democratic goals." Stephen B. Presser, PIERCING THE CORPORATE VEIL, § 1.01, at p. 1-4 (1997) (emphasis in original).[12] In its original conception, "limited liability was perceived as a means of encouraging the small-scale entrepreneur, and of keeping entry into business markets competitive and democratic," an "extremely popular

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[12] The entire question of the rationale and purpose of limited liability has been the subject of energetic scholarly and political debate for almost a century. *See* Presser, *supra,* PIERCING THE CORPORATE VEIL, Chapter 1, "Economics and Democracy: A Historical and Analytical Overview of the Piercing Doctrine." Professor Presser identifies at least three discrete *policy-based* veil-piercing schools and rationales that have developed since the beginning of the 20th Century. These policy-based standards range from the "law and economics" approach (*e.g.*, Manne, *Our Two Corporations Systems: Law and Economics,* 53 Va. L. Rev. 259 (1967); R. Winter, GOVERNMENT AND THE CORPORATION (1978); and F. Easterbrook and D. Fischel, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991)), to the centrist approach based on equity and the review of the proverbial "laundry list" of factors that appears to predominate in the case law (*e.g.*, M. Wormser, DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATION PROBLEMS (1927); F. Powell, PARENT AND SUBSIDIARY CORPORATIONS: LIABILITY OF A PARENT FOR THE OBLIGATIONS OF ITS SUBSIDIARY (1931); and R. Clark, *The Duties of the Corporate Debtor to its Creditors,* 90 Harv. L. Rev. 505 (1977)), to approaches "on the left," Presser at § 1.01, p.1-8 n.13, that would reduce or eliminate limited liability (*e.g.*, P. Blumberg, THE LAW OF CORPORATE GROUPS: SUBSTANTIVE LAW 681-92 (1987) (advocating elimination of limited liability for affiliated corporations); and Hansmann & Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts,* 100 Yale L.J. 1879 (1991)).

Not coincidentally, Petitioner's Brief cites three of Professor Blumberg's books and articles, Pet. Br. 33, 39, 40, but none from any of the competing policy schools in Petitioner's attempt to have this Court make the legislative choice that Congress left to the States and to state law.

justification for limited liability ... rarely observed by modern scholars." *Id.* at p.1-14. Indeed, "if we are still interested in encouraging individual entrepreneurship through incorporation, this ought to be, perhaps, the most crucial aspect to be considered in veil-piercing doctrine." *Id.* at p.1-48.

Limited liability also reduces the potential costs and risks of buying shares, and thus encourages investment and capital formation. *Id.* at p.1-42. "[I]nsulating parents from liability [for] their subsidiar[ies'] activities reduces the costs to the parent," making the parent's shares more valuable and creating added incentive to invest. *Id.* at p.1-68 n.43.10. Limited liability also "facilitates the development of public markets for securities, permits the allocation of risk or benefits between parties, and supports the certainty of planning by those who have organized the corporation." Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1036, 1073 (1991). Some scholars argue that without limited liability "shareholders would find it necessary to monitor closely the activities of their corporations in order to escape liability, and that the high cost of this monitoring would itself discourage investment." Presser, *supra*, at p.1-40. The reduction in monitoring obligations afforded by limited liability likely makes diversification of investment possible. *Id.* "[I]n an era when grave concern is expressed that corporations are too inclined to use debt rather than equity for financing, we should hesitate before undercutting any legal doctrines that appear to promote equity investment." *Id.* at p.1-70. Professor Presser concludes "[a]bsent clear indication from the legislature ... it is difficult to understand how courts can be justified in piercing the veil in a manner that ignores the original legislative justification, the promotion of investment." *Id.* at p.1-69.

The federal courts, in particular, are neither equipped nor

empowered to determine that other policies are more important.[20] The risks of federal judicial law-making are perhaps best exemplified in the Petitioner's own brief, where it sets forth the factual test it would use to implement its "control and participation" legal standard of "operator" liability. According to the Petitioner, "a parent corporation [that] steps beyond its role as a stockholder" of a subsidiary would be liable. Pet. Br. 41. Petitioner would still allow a parent corporation to "exercise [the] traditional powers" of stock ownership, which *Petitioner* would define as the right to "choose the subsidiary's board of directors and to vote on general matters of corporate governance...." *Id.* at 43. "If the parent corporation, however, departs from the [assertedly] typical practice and employs its own agents as executive directors (or as board members performing the typical functions of an executive officer) to manage the subsidiary, then a court may conclude that the parent corporation is, in fact, operating" and CERCLA liability will attach. *Id.* at 44.

The facts are, however, that many — if not most — parent corporations place one or more their officers in senior officer or board positions at their subsidiaries and have long done so under sanction of state law.[21] Under Petitioner's federal

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[20] *See* Presser, *supra*, at p. 1-71 (citation omitted):

> If we are committed to federal and state policies of encouraging investments, it would seem dubious to entrust even the federal courts with what would amount to a delicate task of balancing the policies of encouraging investment and the other, more particularized federal regulatory or welfare goals.... It would seem better, as [Harvard Dean] Clark suggested, to let these delicate balancing acts be performed by the more democratic organs of the state and federal legislatures.

[21] This case does not present the situation where employees of the parent who are not employees of the subsidiary have full-time jobs operating the

common law test, appointment of dual officers, though woefully insufficient to cause the corporate veil to be pierced, would now result in CERCLA liability. The *en banc* Sixth Circuit below correctly observed that the government's test:

> replaces the relatively bright line provided by the traditional doctrine ... with a nebulous 'control' test. When, precisely, is a parent acting in a manner consistent with its investment relationship as opposed to a manner that triggers operator liability? The indicia enumerated ..., such as participation ... and involvement in specific policy decisions, offer little guidance.

United States v. Cordova Chem., 113 F.3d at 580.

Petitioner's test completely ignores the significant issue of role attribution — the long-standing presumption in corporations law that an individual can "wear two hats" and be an officer of both companies, and that when such a dual officer acts in his role as an officer of the subsidiary he binds only *that* corporation. It is a fundamental principle that an officer's actions are *only* attributable to the company on whose behalf he is acting unless one is justified in disregarding the corporate form. As one court described it:

> one-hundred percent ownership *and identity* of directors and officers are, even together, an insufficient basis ... to pierce the corporate veil. Instead, we maintain the fiction that an officer or director of both corporations can change

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subsidiary's business. The court below made a similar observation. 113 F.3d at 579 (case does involve a parent which "independently operate[s] ... in the stead of its subsidiary or as a sort of joint venturer ... alongside its subsidiary"). What test to apply in such a case is not before this Court.

> hats and represent the two corporations separately, despite their common ownership.

United States v. Jon-T Chemicals, Inc., 768 F.2d 686, 691 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986) (citations omitted).[22] Under general corporation law, then, the actions of dual officers or directors affecting the subsidiary are attributable only to the subsidiary unless the veil can be pierced. Any other rule necessarily would result in parent liability for all of a subsidiary's torts or contracts whenever a dual-role person is involved. The government's proposed test invites just such a result.[23]

III. THE QUESTION IN THIS CASE ARISES IN MANY OTHER SITUATIONS UNDER CERCLA

The instant situation — whether to apply existing state law or, instead, create a federal common law rule to determine

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[22] *Accord United States Fire Ins. Co. v. Allied Towing Corp.*, 966 F.2d 820, 828-29 (4th Cir. 1992) (in case of two corporations with identical ownership, boards and management, it was improper to "pierce[] Transerve Marine's corporate veil [by] holding it responsible for the [negligent] inaction of its officers and directors in their capacities as *Allied Towing's* officers and directors") (emphasis in original).

[23] Petitioner's test is doubly improper when one remembers the retroactive nature of CERCLA liability. Petitioner's test would impose liability for business practices based on state law principles that have been in place for nearly a century and — *without any hint of Congressional intent to do so* — would reallocate risk for liabilities flowing from ancient business transactions and practices. Long prior to CERCLA, corporations made decisions about officers' or board members' participation in a subsidiary's corporate governance based upon approved principles of law in effect in their states. Petitioner's test would change the rules after the fact, creating a different standard under the guise of federal common law.

whether a parent corporation is liable under CERCLA at a facility operated by its subsidiary — is only one of several analogous questions of what law to apply that have repeatedly arisen under CERCLA, emphasizing the importance of faithfulness to the federal courts' limited role.

Similar questions arise when a claimant seeks to hold a purchaser of assets from a site owner or operator liable as a "successor" to that owner or operator. Should the court apply the traditional state law asset-purchaser non-liability rule, with its four usual exceptions,[24] or should the court adopt a new federal common law standard perceived by it to further the "goals" of CERCLA?[25] What about when the site operator is a dissolved corporation? Should the court apply state law governing the capacity to sue that corporation[26] or may it develop a special federal common law standard which preempts state corporate dissolution law to address that dissolved corporation's liability?[27] And what if an individual owner or

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[24] *See Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 132 F.3d 1295 (9th Cir. 1997) (applying state law).

[25] *E.g., United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992) (adopting federal "substantial continuity" test); *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 487 (8th Cir. 1992) (adopting "substantial continuity" test but only if buyer knows of seller's liability).

[26] *E.g., Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448, 1451 (9th Cir. 1987) ("CERCLA does not preempt California law determining capacity [of a dissolved corporation] to be sued"); *Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co.*, 68 F.3d 1016, 1019 (7th Cir. 1995) (same, but finding that even if CERCLA preempts F.R. Civ. P. 17 then, under *O'Melveny*, state law would apply).

[27] *E.g., Town of Oyster Bay v. Occidental Chem. Corp.*, 1997 U.S. Dist. Lexis 18151, at *46-47 (E.D.N.Y. Nov. 14, 1997) ("finding Rule 17(b) to

operator is dead? Should the federal court apply generally applicable state probate law regarding the pursuit of claims against estates[28] or is state probate law preempted in favor of a federal policy-based common law rule designed to enhance recoveries from decedents' estates and their beneficiaries?[29] Similar questions have arisen when CERCLA claims are filed against officers, directors or sole shareholders of corporate owners or operators, especially in close corporations,[30] and

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be superseded in the CERCLA context" but noting that "there is no single uniform approach" to the substitute federal common law rule); *New York v. Panex Indus., Inc.*, 1996 U.S. Dist. Lexis 9418, at *17 (W.D.N.Y. 1996) ("CERCLA supersedes FRCvP 17(b) and preempts state [capacity] law," collecting cases at n.23); *Chatham Steel Corp. v. Brown*, 858 F. Supp. 1130, 1152 (N.D. Fla. 1994) (federal common law "dead and buried" test); *U.S. v. Sharon Steel Corp.*, 681 F. Supp. 1492, 1496-98 (D. Utah 1987) (state law preempted where corporation is dead but "the funeral is still going on").

[28] *See Witco Corp. v. Beekhuis*, 38 F.3d 682, 690 (3d Cir. 1994) (respecting state probate law: "It is untenable that Congress intended to reach so deep into the domain of state probate administration and use the heavy hand of CERCLA to disturb and upset long-settled estates.").

[29] *E.g., North Carolina v. W.R. Peele, Sr. Trust*, 876 F. Supp. 733, 743 (E.D.N.C. 1995) (approving claim under federal common law "trust fund theory" against widow who inherited from deceased operator's estate, which was fully and properly closed under state law eight years earlier, because such claim "furthers CERCLA's remedial purpose"); *Soo Line R. Co. v. B.J. Carney & Co.*, 797 F. Supp. 1472, 1485 (D. Minn. 1992) (finding claim-timing provisions of Nevada probate law preempted because Nevada law would "release responsible parties from liability").

[30] *Compare Donahey v. Bogle*, 129 F.3d 838 (6th Cir. 1997), *pet. for cert. pending*, U.S. No. 97-1163 (even sole shareholders of close corporations will be protected by the corporate form unless the veil can be pierced), *with Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1532, 1544 (W.D. Mich. 1989) (corporate officer, director or sole shareholder is liable under CERCLA if he "could have prevented or significantly abated the ... discharge that is the

when claims are filed against the limited partners of limited partnerships that may be CERCLA owners or operators.[31]

The federal courts have splintered in their approach to every one of these questions, sometimes following *Kimbell Foods* but usually exhibiting a lack of fealty and deference to governing state law principles. Correctly, one recent decision adopted the reasoning of *Kimbell Foods*, *O'Melveny*, and *Atherton* and applied state law to resolve a successor liability question. *See*

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subject of the claim," a test based on "an individual's authority to control." Test averred to be "consistent with CERCLA's goals" and "will encourage increased responsibility" which, the district judge wrote, "I take ... to be a positive result...."); *accord Donahey v. Bogle*, 129 F.3d at 845-46 (Martin, C.J., dissenting, urging adoption of *Kelley*'s "prevention" test as law of Sixth Circuit). *See also Riverside Market Dev. Corp. v. International Bldg. Products, Inc.*, 931 F.2d 327 (5th Cir.) (per curiam), *cert. denied*, 502 U.S. 1004 (1991), and *Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417 (7th Cir. 1994) (applying a legal standard — *improperly* derived directly from CERCLA, but essentially identical to the common law test — asking whether corporate officer was "*directly* and *personally* engaged in conduct that led to the specific environmental damage at issue in the case," *e.g.*, *Arst*, 25 F.3d at 421 (emphasis in original)).

[31] *E.g.*, *Redwing Carriers, Inc. v. Saraland Apts.*, 94 F.3d 1489, 1503-05 (11th Cir. 1996). Because the Eleventh Circuit had previously adopted a rule like the one Petitioner urges here that extends "operator" liability to parent companies under a "control" standard, *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107, 1109-11 (11th Cir. 1993), the court applied that same rule to evaluate the liability of limited partners as CERCLA "operators." Under that rule a limited partner would be liable if it:

> either (1) actually participated in operating the Site ... or (2) actually exercised control over or [3] [were] otherwise intimately involved in the operations of, the Partnership.

94 F.3d at 1505. Such a test, of course, rewrites the Uniform Limited Partnership Act in force in almost every state.

Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc., *supra*, (*"ATSF"*).[32] As shown above, however, other courts have improperly developed federal common law tests they unilaterally deemed "superior to the older and more inflexible" state law rules to answer these questions. *E.g.*, *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 519, *reh. denied*, 112 F.3d 88 (2d Cir. 1997), *pet. for cert. pending sub nom. Zollo Drum Co., Inc. v. B.F. Goodrich Co.*, U.S. No. 97-241. The resulting chaos in the CERCLA law is predictable. *See* Sisk and Anderson, *supra*, *The Sun Sets on Federal Common Law*, 16 Va. Envtl. L.J. at 565-67.

The recently decided *Atchison, Topeka & Santa Fe Ry. Co.* case correctly analyzed the appropriate rule to use under CERCLA. There, the Ninth Circuit rejected the argument that a special federal rule under CERCLA should displace state law to address the successor liability of asset purchasers. The Ninth Circuit recognized the reach of *O'Melveny* and *Atherton*:

> Although *O'Melveny* and *Atherton* involve a different federal statute, the underlying analysis is applicable in any situation in which it is necessary to determine whether state law should be supplanted by judicially created federal rules of decision.

132 F.3d at 1299. The court specifically noted *O'Melveny*'s teaching that Congress' silence indicates *not* that the federal

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[32] A few other federal courts, even before this Court decided *O'Melveny* and *Atherton*, had used the *Kimbell Foods* test and decided to adopt traditional corporations law as the federal rule of decision to answer liability questions under CERCLA. *Joslyn v. T.L. James & Co.*, 696 F. Supp. 222, 226-27 (W.D. La. 1988), *aff'd*, 893 F.2d 80, 83 (5th Cir. 1990) (parent-subsidiary question); *Anspec Co. v. Johnson Controls*, 922 F.2d at 1248-51 (Kennedy, J., concurring) (successor liability).

courts should develop their own rules of law but, instead, that they should rely on state law unless the test set forth in *Kimbell Foods* is met. *Id.* Examining the three *Kimbell* factors, the *ATSF* court found, first, that "there has been no real explanation of the need for uniformity" and that "'the law in the fifty states on corporate dissolution and successor liability is largely uniform.'" *Id.* at 1300, *quoting Anspec*, 922 F.2d at 1249. Finding that "the argued 'need' for uniformity ... stem[med] not from disarray among the various states, but from the alleged need for a more expansive view" of liability, the court found "no evidence that the application of state corporation law will frustrate" CERCLA's objectives. *Id.* at 1300-01. "'[M]ore money' arguments," it found, "are unavailing." *Id.* at 1301. State law was thus applied.

CONCLUSION

The breadth of the damage done by the federal courts in the name of CERCLA's "intended" purpose but in derogation of state law is virtually unlimited. The simple solution — and one consistent with constitutional principles of separation of powers and federalism — is to adhere to long-standing state law precepts of limited liability, which Congress nowhere evidenced any intent to supplant. The decision of the Sixth Circuit should be affirmed.

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